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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Parts 1, 2 and 21
of the Commission's Rules
Governing Use of the Frequencies
in the 2.1 and 2.5 GHz Bands

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PR Docket No. 92-80
RM - 7909

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REPLY COMMENTS

Mississippi EdNet Institute, Inc. ("EdNet") and MAX Communications, Inc. ("MAX"), by their attorneys, hereby reply to the comments submitted in response to the *Notice of Proposed Rule Making ("NPRM")* in the captioned proceeding.^{1/}

In the late 1980's, Mississippi Governor Ray Mabus commissioned a task force to study the future of telecommunications in Mississippi and to make recommendations regarding the most effective and efficient means of serving the various pressing telecommunications needs within the state, including the need for Instructional Television Fixed Service ("ITFS") facilities. After numerous meetings open to the public, the Mississippi Interagency Telecommunications Task Force ("Task Force") issued a report on March 10, 1989. That report was endorsed by Governor Mabus, who emphatically stated that "There is no doubt that Mississippi should work aggressively to develop a state-wide, integrated audio, video and data network." Governor Mabus urged action as soon as possible to implement the recommendations, inasmuch as

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^{1/}Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, 7 FCC Rcd 3266 (1992) [hereinafter cited as "NPRM"].

"telecommunications opportunities identified by the task force are enormous and have great promise for all Mississippians."

With regard to the integration of ITFS facilities into that state-wide network, the Task Force recommended that an ITFS system for Mississippi should be developed, operated and wholly controlled by agencies of the state government. The Task Force found state ownership desirable because it would permit an integrated, unified approach allowing the efficient and economic utilization of this valuable resource from the outset. The Task Force proposed a comprehensive plan in order to avoid the "splintering" of the system and the duplicative service that would likely result if the frequencies were authorized piecemeal to unrelated private applicants. More specifically, the Task Force recommended:

that the frequencies be divided into groups for assignment and licensing. The ITFS groups should be allocated to the Mississippi Authority for Educational Television ["MAET"], the State Department of Education and public schools ["SBE"], the Institutions of Higher Learning ["IHL"], and the community and junior colleges.

Consistent with the Task Force's recommendation, MAET, SBE, and IHL soon thereafter collaborated to select common transmitter sites and prepared and filed separate and independent applications proposing statewide ITFS service to substantially all of Mississippi from transmitter sites covering these areas:

Jackson FM Tower, Hinds County, serving Jackson and surrounding areas;

Sharon Microwave Tower, Madison County, serving Sharon and surrounding areas;

Inverness TV Tower, Sunflower County, serving Greenwood and surrounding areas;

Ackerman TV Tower, Choctaw County, serving Mississippi State and surrounding areas;

Columbus Highway Patrol Tower, Oktibbeha County, serving Columbus and surrounding areas;

Booneville TV Tower, Tippah County, serving Booneville and surrounding areas;

Oxford TV Tower, Lafayette County, serving Oxford and surrounding areas;

Rose Hill TV Tower, Jasper County, serving Meridian and surrounding areas;

Melba Microwave Tower, Lamar County, serving Hattiesburg and surrounding areas;

Bude TV Tower, Franklin County, serving Natchez and surrounding areas; and

McHenry TV Tower, Stone County, serving Biloxi and surrounding areas.^{2/}

^{2/}The Commission should note that the ITFS/wireless cable transmitting antennas to be mounted on these towers by MAX pursuant to its excess capacity leasing agreement with EdNet must be mounted above 180 meters height above average terrain ("HAAT") in order to provide the virtual statewide coverage necessary. Were the Commission to adopt the proposal advanced in the *NPRM* limiting transmission antennas to 180 meters HAAT, it would effectively require the installation of far more transmitting sites in Mississippi, undermining the economic foundation of the plans for a statewide ITFS network. Therefore, EdNet and MAX join with every other party that addressed this issue in their initial comments in opposing the Commission's proposal to adopt a HAAT restriction on transmitting antennas. *See, e.g.* Comments of Wireless Cable Ass'n International, PR Docket No. 92-80, at 59-64 (filed June 29, 1992); Comments of Ana G. Mendez Foundation, *et al.*, PR Docket No. 92-80, at 8 (filed June 29, 1992); Comments of Choice TV of Michiana, Inc., PR Docket No. 92-80, at 8 (filed June 29, 1992); Comments of Marshall Communications, Inc., PR Docket No. 92-80, at 3-4 (filed June 29, 1992).

Following extensive discussions and studies subsequent to the filing of the original statewide ITFS applications by MAET, SBE and IHL in August 1989, these parties and the Mississippi State Board for Community and Junior Colleges ("Community Colleges") concluded that the public interests identified by the Task Force would best be served by the implementation of a public/private collaboration designed to maximize the efficient use of the ITFS channels available in Mississippi without the expenditure of significant state funds. To implement such a public/private collaboration, on June 30, 1990 the Mississippi legislature enacted, and the Governor approved, various changes in MAET's enabling legislation authorizing MAET and other state entities to enter into such contracts as may be necessary to implement a statewide ITFS educational television system and to lease excess ITFS capacity on that system.

As a result of that legislation, Ednet was created by MAET, SBE, IHL and the Community Colleges during the summer of 1990 as a Mississippi non-profit corporation to promote, encourage and assist all levels of education, research and economic development in Mississippi, including preschool, elementary, secondary, adult and higher education.^{3/} The corporate purposes of EdNet include the implementation of a public/private arrangement to provide statewide access to a comprehensive ITFS and wireless cable system by contracting with private entities to provide funding for the construction and implementation of such a system

^{3/}The EdNet board of directors is composed of individuals from each of the following: MAET; SBE; the Community Colleges; IHL; The office of the Governor of Mississippi; The office of the Attorney General of Mississippi; and a Mississippi teacher from grades kindergarten through twelfth chosen jointly by the Governor and the Attorney General.

without significant state expenditures. While EdNet is a non-profit corporation, its structure and design are functionally equivalent to a state agency oriented towards educational instructional goals and objections.

Subsequently, EdNet and the Community Colleges also proposed to construct ITFS facilities co-located with the MAET, SBE and IHL facilities. These separate and independent entities contemplate presentation of instructional programming designed for credit courses at all educational levels, primary through post-secondary, and in medical service courses for medical schools as part of the formal requisite training, and for hospital staff training. Based on its own educational objectives and expertise, each entity has chosen a different emphasis for its programming proposals.

Throughout the summer and fall of 1990, EdNet developed a comprehensive Request for Proposal ("RFP") for the funding and implementation of a statewide ITFS system by a commercial wireless cable partner. EdNet released the RFP on November 21, 1990 and required the submission of a response by February 1, 1991.

MAX is a Mississippi corporation that was created for the primary purpose of owning, building, and operating a wireless cable television system designed to serve the state of Mississippi in response to the opportunity afforded by the RFP. After careful consideration of the competing responses to the RFP, EdNet selected MAX as its commercial partner and an excess capacity lease agreement governing all twenty ITFS channels was executed by EdNet and MAX in November 1991, and later ratified by MAET, SBE, IHL and the Community Colleges

in December 1991.^{4/} Pursuant to that agreement, and based upon achieving certain contingencies and milestones, MAX is required to develop a statewide system with transmitting towers located throughout the state of Mississippi to broadcast wireless cable television and ITFS programming to a geographic area that includes 95% of the population of Mississippi.

The comments filed in response to the *NPRM* evidence a growing frustration within the wireless industry over a few commercial entities who appear to be abusing the ITFS process.^{5/} There is evidence before the Commission strongly suggesting that some entities are manipulating local school systems to serve as proxies in the filing of sham ITFS applications designed to frustrate the development of wireless cable systems. For example, one set of comments observes:

Anyone who has substantial experience in the wireless cable industry knows of RuralVision, its abuses of process in ITFS applications filed by its proxy school systems, and other ITFS

^{4/}Copies of that agreement have been filed with the Commission in connection with the individual ITFS facilities involved.

^{5/}See Comments of Fletcher, Heald & Hildreth, PR Docket 92-80, at 9, 27 (filed June 29, 1992)[hereinafter cited as "FH&H Comments"]; Comments of WJB-TV Melbourne Limited Partnership and WJB-TV Ft. Pierce Limited Partnership, PR Docket 92-80, at 10 (filed June 29, 1992); Comments of Emerald Enterprises, Inc., PR Docket No. 92-80, at 12 (filed June 29, 1992)[hereinafter cited as "Emerald Comments"]; Comments of Monterey County Wireless Cable, Inc., PR Docket No. 92-80, at 12 (filed June 29, 1992)[hereinafter cited as "Monterey Comments"]; Comments of Virginia Communications, Inc., PR Docket 92-80, at 12 (filed June 29, 1992) [hereinafter cited as "Virginia Comments"]; Comments of Mitchell Communications Corporation, PR Docket 92-80, at 8, 9 (filed June 29, 1992) [hereinafter cited as "Mitchell Comments"]; Comments of Cardiff Broadcasting Group, PR Docket 92-80, at 18 (filed June 29, 1992) [hereinafter cited as "Cardiff Comments"]; Comments of Paul Jackson Enterprises, PR Docket 92-80, at 12 (filed June 29, 1992); Comments of Universal Wireless Television Corporation, PR Docket 92-80, at 12 (filed June 29, 1992); Comments of Knollwood, Ltd., PR Docket 92-80, at 12 (filed June 29, 1992).

speculators who make filings to extort money from serious wireless cable operators. . . . Among those antics are (i) RuralVision's amendment of the ITFS applications filed by its school/proxies without the knowledge or consent of the school/proxies; (ii) the proposal of such amendments of receiver sites that must be protected which are quite distant from the school/applicants, of no interest to the school/applicants and which serve only to block others' attempts to receive ITFS construction permits; (iii) misrepresentation to the Commission in declarations subject to perjury laws submitted with oppositions to petitions to deny; and (iv) building ITFS station facilities for its school/proxy/licensees that are grossly over authorized power and antenna height.^{6/}

Others note in their comments that:

The Commission is well aware of the modus operandi of firms such as Rural Vision, which enter into lease agreements with hapless local schools only to hold critical channels for a king's ransom, utterly beyond the reach of wireless operators unless they accede to absurd lease demands.^{7/}

EdNet and MAX recognize that although the plans for developing a statewide ITFS network in Mississippi have not been adversely impacted by the filing of sham ITFS applications, it is indeed a serious problem that the Commission will have to address.

In responding to the *NPRM*, a few commentators have suggested that the Commission stop this reprehensible conduct by retroactively banning ITFS licensees from leasing excess capacity to entities that have not secured a minimum of four MDS channels in their market.^{8/} Apparently such a rule would stop the most frequently cited abuser, RuralVision, as

^{6/}FH&H Comments, at 9-10.

^{7/}Emerald Comments, at 12; Monterey Comments, at 12; Cardiff Comments, at 18.

^{8/}See, e.g. Mitchell Comments, at 8; Virginia Comments, at 12.

MAX and EdNet understand that RuralVision rarely secures commercial channel capacity. Nonetheless, EdNet and MAX submit that adoption of such a ban by the Commission would be over-broad and contrary to the public interest.

In crafting a solution to the problems raised by those abusing the availability of ITFS excess capacity leasing, the Commission must take care not to bar relations such as those between MAX and EdNet, a quasi-governmental organization specifically created, as set forth in EdNet's by-laws, "to promote, encourage and assist all levels of education, research and economic development primarily within the State of Mississippi, including preschool, elementary, secondary, adult and higher education, especially in local communities and rural areas of the state, by implementing a public/private partnership to provide statewide access to a wireless cable television system for all Mississippians." The restrictions on excess capacity leasing would, if adopted, effectively preclude statewide excess capacity leasing agreements, such as the arrangement between EdNet and MAX, despite the determination by the Mississippi Governor and legislature that such an agreement provides the maximum benefit to the educational entities in the state of Mississippi. Although MAX has secured some MDS channel capacity within Mississippi, it would be unreasonable for the Commission to require that MAX or any other prospective wireless cable operator secure four MDS channels in every portion of the state before contracting with EdNet to lease excess capacity on Mississippi's statewide ITFS network.

Effectively precluding statewide ITFS networks from engaging in excess capacity leasing is contrary to the purposes underlying the Commission's efforts to promote the

development of the ITFS through public/private partnerships with wireless cable operators. The Commission has previously recognized that statewide networks "can provide many benefits to communities through the exchange of programming among all stations in the system and through the economies resulting from cost-sharing."^{2/} To effectively ban statewide networks from entering into public/private arrangements designed to fund statewide access to comprehensive ITFS and wireless cable system would be inconsistent with the Commission's goal of promoting optimum utilization of the ITFS spectrum, as few states can afford to develop such networks without financial assistance from the private sector.

In short, the proposal advanced by these commentators to halt the filing of sham ITFS applications is overbroad. While EdNet and MAX certainly agree that the Commission should take action against those who abuse the Commission's processes, the Commission must

^{2/}*Amendment of Part 74 of the Commission's Rules and Regulations in regard to the Instructional Television Fixed Service*, 98 F.C.C.2d 1249, 1257 (1984). See also, *Amendment of Part 74 of the Commission's Rules and Regulations in regard to the Instructional Television Fixed Service*, 101 F.C.C.2d 50, 59 (1985).

take care not to cast its net so broadly that relationships such as that between EdNet and MAX are frustrated.

Respectfully submitted,

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